No. 78-1894

In the Supreme Court of the United States

OCTOBER TERM, 1978

FORT PIERCE UTILITIES AUTHORITY OF THE CITY OF FORT PIERCE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA AND THE NUCLEAR REGULATORY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-31) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on March 23, 1979. The petition for a writ of certiorari was filed on June 21, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in enacting the 1970 amendments to the Atomic Energy Act, Congress intended to exempt nuclear power plants already holding research and development

licenses from post-licensing antitrust review by the Nuclear Regulatory Commission.

STATUTES INVOLVED

The relevant sections of the Atomic Energy Act, 42 U.S.C. 2132-2135, and 42 U.S.C. 2236, are set forth at Pet. App. A-32 to A-36.

STATEMENT

Florida Power & Light Co. ("FPL"), operator of the three nuclear power plants at issue here, received a construction permit for each of the plants pursuant to Section 104(b) of the Atomic Energy Act, 42 U.S.C. 2134(b), before the Act was amended in 1970.[1] Operating licenses for the plants were issued pursuant to Section 104(b) in 1972, 1973, and 1976. No one requested, nor did the Nuclear Regulatory Commission[2] conduct, an antitrust inquiry in connection with the licensing of the three power plants (Pet. App. A-4 to A-5).

The first request for antitrust review was made on August 6, 1976 when petitioners, the Florida Municipal Utilities Association and a group of Florida municipalities and municipal electric systems ("Florida Cities"), sought to intervene on antitrust grounds in a construction permit proceeding for another FPL plant. They joined with that petition a request for an antitrust hearing on the three plants already holding operating licenses. An Atomic

[1]Construction permits were issued for two of the plants on April 29, 1967, and for the third plant on July 1, 1970 (Pet. App. A-4). The 1970 amendments to the Act became effective December 19, 1970.

[2]The Nuclear Regulatory Commission succeeded to the licensing and regulatory functions of the Atomic Energy Commission on January 15, 1975. 42 U.S.C. 5801, 5841(f). We use "Commission" to refer either to the AEC or the NRC as the context suggests.

Safety and Licensing Board denied the request (Pet. App. A-6).

On August 23, 1977 the Commission's Appeal Board affirmed, holding that Commission post-licensing antitrust review of Section 104(b) licensed power plants was unavailable under the statute, as amended (Pet. App. A-41 to A-48). The Board reasoned that in the 1970 amendments Congress had expressly excluded from the prelicensing antitrust review provisions of Section 105(c) those power reactors which had been licensed under Section 104(b) for research and development prior to the amendments (Pet. App. A-44). The Board also found that review premised on any other section of the Atomic Energy Act was unavailable under the Commission's ruling in *Houston Lighting & Power Company*, 5 N.R.C. 1303 (Pet. App. A-51 to A-81), where the Commission held that Section 105 encompasses the totality of the Commission's antitrust hearing responsibilities. In any event, the Board found that the provisions of Section 186(a) of the Act, 42 U.S.C. 2236(a), upon which Florida Cities relied, were inapplicable. That section empowers the Commission to revoke a license on any ground that would warrant the Commission to refuse to grant the original license. The Board held that Section 186(a) could not serve as a source of antitrust review authority here because Section 104(b) licenses had by statute never been subject to prelicensing antitrust review (Pet. App. A-45).

The Commission declined to review the Appeal Board's decision, but directed that the allegations contained in Florida Cities' petition be referred to the Department of Justice for investigation and possible enforcement action (Pet. App. A-49 to A-50).

The court of appeals affirmed the Appeal Board's decision. In doing so, the court specifically reserved the

broad question of whether Section 105 is the Commission's exclusive grant of antitrust authority over all types of operating licenses for nuclear facilities (Pet. App. A-30 n.17). Instead, it based its decision on the narrow ground (Pet. App. A-30)

> that even assuming that section 186(a) vests the Commission with antitrust authority over operating licenses other than that provided in section 105, it does not, by its own terms, authorize postlicensing antitrust review of the section 104(b) operating licenses at issue here. This decision turns on our view that section 186(a) is not a plenary grant of authority to revoke a license, but rather a limited grant of such authority applicable only where conditions are revealed that would warrant the Commission, under current licensing standards for the type of license in question, to refuse to grant a license on an original application. In the instant case, involving section 104(b) operating licenses which are exempt under current licensing standards from prelicensing antitrust review, Florida Cities are not entitled to postlicensing antitrust review under section 186(a) inasmuch as their allegations of antitrust violations, even if true, would not warrant the Commission to refuse to grant a license on an original application.[3]

[3]The court of appeals noted that this interpretation of the Atomic Energy Act did not, as Florida Cities had asserted (Pet. 11; Pet. App. A-31), give FPL carte blanche to use its nuclear power plants contrary to the antitrust laws (Pet. App. A-31):

> Section 105(a) not only provides that nothing in the Act preempts the normal operation of the antitrust laws, but also vests the Commission with authority to revoke or modify FP&L's operating licenses in the event that a court finds that FP&L has violated those laws in the course of licensed activity. Moreover, the Commission, acting pursuant to section 105(b), has already forwarded Florida Cities' antitrust allegations to the Justice Department.

ARGUMENT

The decision of the court of appeals is correct, does not conflict with any decision of this Court or any other court of appeals, and does not warrant review by this Court. The Atomic Energy Act generally provides for two types of construction permits and operating licenses for nuclear facilities: (1) those issued under Section 104(b), known as research and development licenses, which are subject to minimum regulations, and (2) those issued under Section 103, known as "commercial" licenses, which are subject to full-scale Commission regulation. See 42 U.S.C. 2132-2134.

The 1970 amendments to the Atomic Energy Act were enacted to clarify the Commission's antitrust review obligations in licensing matters. Prior to their enactment, the Commission had never undertaken antitrust review of any nuclear power plant license application because all licenses had been issued under Section 104(b), the research and development licensing provisions of the Act. Section 104(b), the Commission and the courts had held, did not authorize Commission antitrust review. *Cities of Statesville* v. *AEC*, 441 F. 2d 962, 973 (D.C. Cir. 1969) (en banc). Under the pre-1970 scheme, any antitrust review of a license application had to await a Commission finding that the power plant sought to be built or operated was of "practical value" for industrial or commercial purposes.[4] Such a finding would require issuance of a commercial license under Section 103, 42 U.S.C. 2133, which in turn requires Commission antitrust review.[5] Section 105(c), 42 U.S.C. 2135(c); *Cities of Statesville* v. *AEC*, *supra*, 441 F. 2d at 974.

[4]See former Section 102, 42 U.S.C. (1964 ed.) 2132; *Cities of Statesville*, *supra*.

[5]Plants that had received construction permits and operating licenses before 1970 under Section 104(b) did in fact sell power commercially, but they were not deemed for regulatory purposes to

The statutory scheme Congress adopted in 1970 eliminated the requirement of a practical value finding. Now, with certain limited exceptions, all facilities must be licensed under Section 103 and, hence, screened for any adverse antitrust impact. After due consideration, however, Congress specifically exempted from such antitrust review any previously issued Section 104(b) licenses unless (as is not the case here) there had been a request for intervention on antitrust grounds at the construction permit stage. Section 102(b), 105(c)(3), 42 U.S.C. 2132(b), 2135(c)(3).[6]

The court of appeals thus correctly found (and petitioners do not contend otherwise) that, in enacting the 1970 amendments to the Atomic Energy Act, Congress specifically grandfathered from pre-licensing antitrust review the category of Section 104(b) licenses at issue here (Pet. App. A-13 to A-14, A-21). Since the Commission is not now, and never has been, empowered to refuse a Section 104(b) license based on antitrust considerations, it follows that the Commission's general regulatory powers to bring earlier licensees up to current standards for their class of license do not authorize

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be "commercial" plants that had to be licensed under Section 103 because the Commission had never made the "practical value" determination required by Section 103. As discussed in the text, the 1970 amendments changed that system.

[6]Although the court of appeals in *Cities of Statesville*, *supra*, had held that under the pre-1970 statutory scheme the Commission had no authority to consider antitrust allegations in licensing proceedings under Section 104(b), the proviso in the 1970 amendments now codified in 42 U.S.C. 2135(c)(3) was designed to permit parties in the situation of the petitioners in *Statesville*, who had raised antitrust objections at the construction permit stage before 1970, to renew those objections and require the Commission to consider those claims at the post-1970 operating license stage.

antitrust review of these particular power plants (Pet. 8, 13-14 & n.14). It is equally apparent that Section 186(a) does not provide the post-licensing review authority sought by petitioners. Section 186(a) authorizes the Commission to revoke a license "because of conditions revealed * * * which would warrant the Commission to refuse to grant a license on an original application * * *." 42 U.S.C. 2236(a). If a "condition revealed" would not warrant the Commission's refusing a license in the first instance, it cannot be the basis under Section 186(a) for revocation of a license.

Therefore, as the court of appeals observed (Pet. App. A-22), since the original license applications were expressly exempt from antitrust review, "it would be anomalous to interpret section 186(a) as authorizing postlicensing antitrust review under section 103 standards of the section 104(b) licenses at issue here * * *."[7] The decision of the court of appeals is thus wholly consistent

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[7]Petitioners mischaracterize the court of appeals' decision in *Cities of Statesville*, *supra*, when they claim that the court has "ignore[d] * * * its own *Statesville* decision" and that Congress must have relied on and "endorse[d] the *Statesville* determination that under §186 'all' licenses are subject to post-licensing antitrust authority" (Pet. 20-21).

Cities of Statesville involved the Commission's prelicensing antitrust responsibilities. The questions presented were (1) whether the Commission had properly relied on Section 104(b) rather than Section 103 to issue the construction licenses at issue, and (2) if so, whether the Commission had correctly concluded that Section 104(b) gave it no antitrust review authority. 441 F. 2d at 969. The court upheld the Commission on both grounds. It then went on, in dicta, to discuss the Commission's antitrust responsibilities under other provisions of the Act. The court viewed the construction license proceeding before it as the first step in the statutory scheme. *Id.* at 974. The second step would be securing an operating license. The court strongly suggested that at that point the Commission carefully consider granting an operating license under Section 103, rather than 104(b), if the commercial feasibility of the facility warranted it. And in that case, the court admonished, the

with both the language and legislative history (Pet. App. A-19 to A-24) of the 1970 amendments.[8]

Finally, the court's decision does not have the broad implications petitioners suggest (Pet. 10). It deals, rather, with the narrow determination, explicitly addressed and resolved by Congress, that facilities that had been licensed under Section 104(b) prior to December 1970, and which had never been challenged on antitrust grounds, should not be subject to Commission antitrust review in later proceedings. Furthermore, there is no basis for petitioners' suggestion (Pet. 11) that the decision below leaves operators of such facilities free to violate the antitrust laws. As the court of appeals noted (Pet. App. A-31), aggrieved parties are always free to file an antitrust

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Commission must consider antitrust impact. The court then went on to discuss what it called the "final step" in the Commission's oversight functions. It was in the context, therefore, of discussing Section 103 that the court observed: "[U]nder section 186(a) * * * the Commission has the power to revoke any type of license it has issued when there is 'a violation of, or failure to observe any of the terms and provisions' of the Act" (*id.* at 974). Contrary to petitioners' claim, this statement was plainly not an endorsement of Section 186(a) as authority to revoke a Section 104(b) license on antitrust grounds. And petitioners point to nothing in the legislative history of the 1970 amendments which suggests that Congress viewed the decision as such an endorsement. To the contrary, as petitioners and the court of appeals agree, the 1970 amendments focused on the Commission's licensing functions under Section 105, and were, at least in part, an express refutation of the *Statesville* rationale (Pet. 21; Pet. App. A-14).

[8]The Commission's Appeal Board had reached the same conclusion (see Pet. App. A-45 and page 3, *supra*). There is therefore no merit to petitioners' contention that the court's decision "is premised upon grounds not even relied upon by the agency itself" (Pet. 27; see also Pet. 4).

complaint in the district courts and obtain a judicial determination of their claims.[9]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[9]Indeed, as petitioners note (Pet. 11-12), there has been such an adjudication respecting the activities of FPL (*Gainesville Utilities Department* v. *Florida Power and Light Co.*, 573 F. 2d 292 (5th Cir.), cert. denied, No. 78-476 (Nov. 13, 1978)), and the Commission has under advisement motions asking it to conduct an antitrust inquiry under Section 105(a) of the Act, 42 U.S.C. 2135(a).

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